THE HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Misc. Application No. 676/2001
(Old No. 10460 of 1983)

Date of decision :- 18.5.2005

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 18.5.2005 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the Judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No.676/2001
(Old No. 10460 of 1983)

1. Devi Singh S/o Sri Lal Singh
   R/o village Kharayatgaon Simalkot
   Patti Talla, Baldia District Pithoragarh
2. Mohan Singh S/o Sri Nain Singh
   Village Kharayatgaon
   Patti Talla Baldia
   District Pithoragarh ……Applicants

Versus

1. Pratap Singh S/o Sri Jaman Singh
   R/o Kharayatgaon
   Patti Talla Baldia
   District Pithoragarh
2. State of Uttaranchal

Hon'ble J. C. S. Rawat, J.

Heard Sri Kuldeep Rawal learned counsel for the applicants and Sri G. S. Sandhu learned A.G.A. for the State.

This is a petition under section 482 Cr.P.C. for quashing the judgment and order dated 2.7.1983 passed by the Sessions Judge, Pithoragarh in Criminal Revision No.5/1983 Pratap Singh Vs. Deb Singh & others.

Brief facts of the case are that the respondent No.1 moved an application before the S.D.M. under section 133 Cr.P.C., alleging therein that there was a public path to the other villages and the applications had created constructions on the public way. Thereafter, vide order dated 12.3.1981, the S.D.M. directed the applicants either to remove the obstructions of the public way or to present in his court on the date fixed for showing cause why the aforesaid conditional order should not be made absolute. The applicants filed their reply of the aforesaid order, in which it was stated that there was no Bandobasti Rasta and nor the applicants had created any obstructions. The applicants had denied the

existence of the public way. The applicants in support of their contention produced witnesses, namely Gopal Ram, Amin, Ram Singh, K. Kanungo. The witnesses have clearly stated that neither there was public way nor the applicants constructed any constructions. A report was also sought from the Tehsildar in this regard by the S.D.M. After completing the enquiry under section 137 Cr.P.C. the learned Magistrate passed the order that there is reliable evidence in support of the denial of public path and stayed the proceedings till the right of existence of public way is decided by the competent court.

Feeling aggrieved by this said order, the respondent No.1 preferred a revision before the learned Sessions Judge on the ground that the S.D.M. has not given the opportunity to adduce the evidence to the revisionist in rebuttal in support of his contention. Vide order dated 2.7.1983, the learned Sessions Judge allowed the revision and set-aside the order of the S.D.M. The Sessions Judge remanded the case to the S.D.M. for fresh disposal. Feeling aggrieved to the order of the Sessions Judge, the applicants have come up before this Court.

The learned counsel for the applicants contended that the respondent No.1 was never prevented from adducing his evidence at the stage of the proceedings under section 137 Cr.P.C. The respondent No.1 did not adduce any evidence. It was further contended that the respondent No.1 has clearly participated in the proceedings before the Magistrate and he cross-examined all the evidence which was produced before the Magistrate. As such, the respondent No.1 cannot say that no opportunity was given to adduce the evidence. It was further contended on behalf of the

applicants that section 137 Cr.P.C. clearly envisages that the inquiry is based on the ex-parte evidence adduced on behalf of the opposite parties, against whom the conditional order has been passed. The learned A.G.A. refuted the contention and contended that the word 'inquriy' has been used in section 137(2). When the Magistrate passes the conditional order against the person, the Magistrate shall ask him as to whether he denies the existence of any public path. If he denies the existence of public path the Magistrate will hold an inquiry as contemplated under section 137 Cr.P.C. The burden of proof lies upon the party who denies the existence of public path. However, in such inquiry both the contesting parties are fully entitled during the enquiry to adduce their evidence and to take part actively in these proceedings. The parties are also supposed to adduce the evidence against each other to assist the court arriving at a particular finding. The Magistrate is bound to give the opportunity to the other party to lead the evidence in rebuttal under section 137(2) Cr.P.C. In the instant case, the Magistrate has not given the opportunity to the other party to lead the evidence in rebuttal. As such the order of the Magistrate is bad in law. Therefore, the learned Sessions Judge had rightly allowed the revision.

In view of the above, I am in agreement with the findings of the learned Sessions Judge. The petition devoid of merit and is liable to be dismissed.

The petition is dismissed accordingly.

(J. C. S. Rawat, J.)

Dated 18.5.2005

LSR